

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33573

JOHN ODLE,)	2008 Unpublished Opinion No. 686
)	
Petitioner-Appellant,)	Filed: October 27, 2008
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Ronald J. Wilper, District Judge.

Order summarily dismissing application for post-conviction relief, affirmed.

Molly J. Huskey, State Appellate Public Defender; Heather M. Carlson, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

PERRY, Judge

John Odle appeals from the district court's order summarily dismissing his application for post-conviction relief. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

In 2005, Odle pled guilty to possession of a controlled substance, methamphetamine. I.C. § 37-2732(c). He was sentenced to a unified term of seven years, with a minimum period of confinement of two years. Odle filed a pro se application for post-conviction relief containing numerous claims and was appointed counsel. A status conference was held, and Odle informed the district court that he was pursuing a claim of ineffective assistance of trial counsel for his attorney's failure to request or obtain a psychological evaluation prior to sentencing. To support this claim, Odle filed a motion requesting a psychological examination. The state objected on the ground that Odle's application did not contain a claim regarding ineffective assistance based

on a lack of a psychological evaluation. The district court agreed with the state, denied Odle's motion, but noted that Odle could amend his application to include that claim and then renew his request for a psychological examination.

Odle filed an amended application for post-conviction relief, which provided that Odle "asserts that his trial counsel's failure to seek an order for psychological evaluation, pursuant to Idaho Code § 18-211 and/or § 19-2522, resulted in [Odle's] complete mental condition not being factored at sentencing." Despite filing an amended application, Odle did not again request a psychological evaluation. The state filed an answer to Odle's amended application and a motion for summary dismissal. The district court granted the state's motion, and issued an order summarily dismissing Odle's application. Odle appeals.

II.

STANDARD OF REVIEW

An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). An application for post-conviction relief differs from a complaint in an ordinary civil action. An application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code Section 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the

applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988); *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987). Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file; moreover, the court liberally construes the facts and reasonable inferences in favor of the nonmoving party. *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

III. ANALYSIS

Odle raises only one issue on appeal. Odle contends that the district court erred in summarily dismissing his application for post-conviction relief, asserting that he raised a genuine issue of material fact regarding his claim that his trial attorney was ineffective for failing to seek a psychological evaluation of Odle prior to sentencing. The state counters that the district court properly dismissed Odle's claim because his allegation that his trial counsel's failure to seek a psychological evaluation resulted in his complete mental condition not being factored at sentencing is conclusory and inadequate to create a genuine issue of material fact.

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish

prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Aragon*, 114 Idaho at 761, 760 P.2d at 1177. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Knutsen v. State*, 144 Idaho 433, 443, 163 P.3d 222, 232 (Ct. App. 2007). This Court has long-adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

A claim that trial counsel provided ineffective assistance by failing to investigate a defendant's mental condition and request a psychological evaluation for use at sentencing is properly brought under the post-conviction procedure act. *See generally Richman v. State*, 138 Idaho 190, 59 P.3d 995 (Ct. App. 2002); *Vick v. State*, 131 Idaho 121, 952 P.2d 1257 (Ct. App. 1998). In *Richman*, a post-conviction applicant presented evidence from a psychologist who opined that, despite no mention of psychological issues in the presentence investigation report (PSI), evidence concerning Richman's psychological state and a psychological evaluation may have been relevant in fashioning Richman's sentence. *Richman*, 138 Idaho at 194, 59 P.3d at 999. The psychologist also determined that Richman's mental illness and drug intoxication at the time of the offense did affect his behavior in committing his crimes. In dismissing Richman's post-conviction application, the district court concluded that, Richman's sentence would not have been different had information concerning his mental condition been submitted at sentencing. Therefore, on appeal this Court determined that, although Richman's counsel's performance was deficient, Richman had failed to demonstrate that his trial counsel's deficient performance had prejudiced the outcome of his case. *Id.*

In this case there was significant, although somewhat dated, information before the district court regarding Odle's mental health. The PSI provides a half of a page of mental health comments and notes that Odle has undergone multiple psychological evaluations within the Idaho Department of Correction and that those evaluations were appended to the PSI for the district court's review. Appended to the PSI were psychological evaluations from March 16, 1983; September 9, 1980; September 4, 1980; July 28, 1980; July 8, 1980; and November 28, 1979. However, even if we assume for the purpose of this opinion only that Odle's trial counsel's performance was deficient for failing to request a more recent psychological evaluation

for use at Odle's sentencing, Odle has failed to do more than provide bare and conclusory allegations to support his claim that he was prejudiced by trial counsel's performance.

At sentencing, both the state and Odle referenced his mental health. Specifically, the state argued:

The state understands that [Odle] draws social security disability for schizophrenia and paranoia. There is a doctor's opinion that perhaps that is exaggerated, but the state recognizes that he may have some mental health issues that may be a result of previous drug use. But he really hasn't been sober enough in recent history to sort out what is a mental health issue and what is a substance abuse issue. He obviously has issues with poor peer choices as well [as] his continued substance abuse, no employable skills, and not much in the way of family support. If it were just that, there may be some very structured intensive probation that could be offered to him. But considering the fact that his criminal history includes delivery of controlled substances and a kidnapping conviction, those are very serious convictions.

The state also noted that Odle had a consistent criminal history since the 1970s. Odle's extensive criminal history included sixteen confirmed misdemeanor convictions and six confirmed felony convictions as well as numerous other charges that were dismissed. In sentencing Odle, the district court concluded:

And I have considered your mental condition in fashioning your sentence. What I'm going to do is sentence you to the custody of the department of corrections for two years fixed and five years indeterminate for a total of seven years. I am going to recommend that the state perform a mental evaluation and order that you undergo a mental evaluation while you're in the custody of the department of corrections. Mr. Odle, I don't have any confidence at all that you would be a successful candidate for probation. I don't think that you could do probation successfully, and so I'm not going to order probation.

You have a real long history, and I think you recognize that you have a lot of issues to deal with in your life. I just don't think you're a good candidate for probation, and you have committed this felony offense.

In addition to the district court's conclusion that Odle would not be successful on probation--eliminating that sentencing option--the district court also explained that it had considered Odle's mental condition in fashioning his sentence and ordered that Odle undergo a mental evaluation while in custody.

Relatedly, Odle filed a pro se I.C.R. 35 motion for reduction of sentence that was untimely. In his post-conviction application, Odle presented an ineffective assistance of counsel

claim based on his trial attorney's failure to file a timely Rule 35 motion on his behalf. In regard to that claim, the district court's order dismissing Odle's application provided:

In the untimely Rule 35 motion filed by [Odle] pro se, he argues that his sentence should be reduced due to his mental illness and the fact that he is a drug addict, therefore rendering his sentence cruel and unusual treatment. However, the Court was already aware of these facts.

Furthermore, the district court concluded that "if the basis of the motion would be similar to the enumerated complaints in the Petition for Post-Conviction Relief, the Rule 35 Motion would certainly fail." Again, the district court indicated that it was aware of Odle's mental condition and implied that Odle's mental condition was not a sufficient reason for granting his Rule 35 motion.

In the order summarily dismissing Odle's claim of ineffective assistance of counsel at issue in this case, the district court concluded that "although an argument based on failing to obtain a § 19-2522 psychological evaluation could be meritorious, [Odle] failed to establish facts upon which the claim would be based. Therefore, the Motion to Dismiss is granted on this allegation." We agree with the district court's conclusion, especially regarding the prejudice prong of the ineffective assistance of counsel determination.

On appeal, Odle offers little to support his argument that he was prejudiced by his trial attorney's failure to request or obtain a psychological evaluation prior to sentencing. Specifically, Odle argues he was prejudiced because the district court did not have adequate information regarding his mental health when sentencing him and that the PSI recommended incarceration without an updated psychological evaluation. However, the argument that the district court would have imposed a lesser sentence with the aid of an updated psychological evaluation is a conclusory allegation that is unsupported by admissible evidence. Furthermore, it is a claim that is contrary to the evidence of Odle's mental condition in the record and the numerous statements by the district court indicating that it had considered Odle's mental health when fashioning his sentence. In addition, in this case Odle did not renew his motion for a psychological evaluation despite the district court's invitation to do so. Accordingly, he failed to present admissible evidence supporting the prejudice prong of *Strickland*. Much like the facts in *Richman*, in this case the district court's many references to Odle's mental condition and its conclusion regarding Odle's Rule 35 motion indicate that, even if an updated psychological evaluation had been obtained before sentencing, Odle would not have received a lesser sentence.

Odle has not presented any evidence to meet his burden of showing a reasonable probability--a probability sufficient to undermine confidence in the outcome of his sentencing proceeding--that, if his trial attorney had requested a psychological evaluation prior to sentencing, Odle would have received a different sentence.

IV.

CONCLUSION

Odle has not raised a genuine issue of material fact regarding whether he was prejudiced by his trial attorney's failure to request or obtain a psychological evaluation prior to sentencing. Therefore, the district court's order summarily dismissing Odle's post-conviction application is affirmed. No costs or attorney fees are awarded to either party on appeal.

Chief Judge GUTIERREZ and Judge LANSING, **CONCUR.**